Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. May an enactment that has been authoritatively interpreted as proscribing conduct that constitutes fighting words and incites imminent lawless action be sustained, on its face, against claims that it is substantially overbroad and impermissibly vague?

2. Is such an enactment narrowly tailored to serve the compelling state interest of protecting victims of bias-motivated harassment against violation of their basic individual rights, which, on balance, far outweigh any minimally protected expression on the part of the accused?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	5
Argument	6
I. Section 292.02 of the St. Paul, Minnesota Legislative Code, as Authoritatively Construed by the Minnesota Supreme Court, is Neither Substantially Overbroad Nor Impermissibly Vague; it is Valid on its Face and as Applied to Petitioner's Conduct	6
(A) The St. Paul Ordinance has been authoritatively construed by the Supreme Court of Minnesota	6
(B) The St. Paul Ordinance forbidding racial, religious, and gender-biased disorderly conduct is not substantially overbroad	11
(C) The St. Paul Ordinance is not impermissibly vague in violation of the Fifth Amendment to the United States Constitution	14
II. The St. Paul Ordinance May be Sustained Against Facial Attack Under the *Chaplinsky* and *Brandenburg Decisions*	16
(A) The St. Paul Ordinance may validly be enforced as conduct that tends to invite an immediate breach of the peace	16

	Page
(B) The St. Paul Ordinance may validly be enforced as conduct that by its very utterance causes injury	19
(C) The St. Paul Ordinance may validly be enforced as conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action	22
III. Bias-Motivated Offenses Do Not Implicate Political Dialogue in a Public Forum	23
IV. The St. Paul Ordinance is a Content Neutral Enactment Carefully Tailored to Further the Compelling State Interest of Protecting the Fundamental Rights of Victims of Bias-Motivated Harassment	27
Conclusion	42

TABLE OF AUTHORITIES

United States Supreme Court Decisions: Page

Alderman v. United States,
394 U.S. 165 (1969) 13

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 29

Barnes v. Glen Theater, Inc.,
—— U.S. ——, 59 LW 4745 (1991) 30

Bigelow v. Virginia,
421 U.S. 809 (1975) 14

Board of Airport Comm'rs of Los Angeles v.
Jews for Jesus, 482 U.S. 569 (1987) 12

Boos v. Barry,
485 U.S. 312 (1988) 13, 24, 25, 27, 35

Brandenburg v. Ohio,
395 U.S. 444 (1969) 9, 16, 22

Broadriek v. Oklahoma,
413 U.S. 601 (1973) 10, 12, 13

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 12

Brown v. Board of Education,
347 U.S. 483 (1954) 37

Cantwell v. Connecticut,
310 U.S. 296 (1940) 15

Carey v. Brown,
447 U.S. 455 (1969) 33

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 9, 15, 16, 17, 18

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 19

Page

City of Houston v. Hill,
482 U.S. 451 (1987) 10, 11, 18

City of Los Angeles v. Preferred Communications,
Inc., 476 U.S. 488 (1986) 32

City of Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1986) 29, 30

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 29, 31

Coates v. City of Cincinnati,
402 U.S. 611 (1971) 13

Cohen v. California,
403 U.S. 15 (1971) 23, 27

CISPES (Committee in Solidarity with the People
of El Salvador) v. Federal Bureau of Investigation,
770 F.2d 468 (5th Cir. 1985) 35

Connally v. General Construction Co.,
269 U.S. 385 (1926) 14

Dombrowski v. Pfister,
380 U.S. 479 (1965) 12

Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 19

Eichman v. United States,
496 U.S. ——, 110 S.Ct. 2404 (1990) 23

Erznoznik v. City of Jacksonville,
422 U.S. 204 (1975) 11, 36

F.C.C. v. Pacifica Foundation,
438 U.S. 726 (1988) 18

Fox v. Washington,
236 U.S. 273 (1914) 15

Page

Frisby v. Schultz,
487 U.S. 474 (1988) 10, 30, 31, 32, 33
Gooding v. Wilson,
405 U.S. 518 (1972) 11, 17, 18
Grayned v. City of Rockford,
408 U.S. 104 (1972) 19
Hess v. Indiana,
414 U.S. 105 (1973) 17
Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 13
Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 18, 19
International Society for Krishna Consciousness,
452 U.S. 604 (1981) 29
Kovacs v. Cooper,
336 U.S. 77 (1949) 33
Land v. Taturn,
408 U.S. 1 (1972) 14
Lewis v. City of New Orleans,
415 U.S. 130 (1974) 11, 17, 18
Lucas v. Arkansas,
416 U.S. 919 (1974) 11
Massachusetts v. Oakes,
491 U.S. 576 (1989) 10, 12
Members of City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 25, 32
N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 12
Nash v. United States,
229 U.S. 373 (1913) 14, 15

Page

New York v. Ferber,
458 U.S. 747 (1982) 32
Rankin v. McPherson,
483 U.S. 378 (1987) 20
Renton v. Playtime Theaters, Inc.,
475 U.S. 41 (1985) 29, 30
Sable Communications of California, Inc. v. F.C.F.,
492 U.S. 115 (1989) 30
Schaumburg v. Citizens for a Better Environment,
444 U.S. 620 (1980) 17
Schenck v. United States,
249 U.S. 47 (1919) 22
Shad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 30, 31
Street v. New York,
394 U.S. 576 (1969) 18
Texas v. Johnson,
491 U.S. 397 (1989) 8, 23, 27, 34
Thornhill v. Alabama,
310 U.S. 88 (1940) 15
United States v. Albertini,
472 U.S. 675 (1985) 31
United States v. O'Brien,
391 U.S. 367 (1968) 27, 28, 32, 34
United States v. Price,
383 U.S. 787 (1966) 35
United States v. Schenck,
249 U.S. 47 (1919) 22
Virginia Pharmacy Board v. Virginia Citizens
Consumer Council, Inc., 425 U.S. 748 (1976) 29

Page

Virginia v. American Bookseller's Ass'n, Inc.,
488 U.S. 905 (1988) 10
Ward v. Rock Against Racism,
491 U.S. 781 (1989) 10, 28
Watts v. United States,
394 U.S. 705 (1969) 20
Wayte v. United States,
470 U.S. 598 (1985) 30

Federal Decisions:
Collin v. Smith,
578 F.2d 1197 (7th Cir. 1978) 24, 25, 27
United States v. Hoffman,
806 F.2d 703 (7th Cir. 1986) 20
United States v. Khorrami,
895 F.2d 1186 (7th Cir. 1990) 20
United States v. Lee,
935 F.2d 952 (8th Cir. 1991) 33, 36, 40
United States v. Merrill,
746 F.2d 458 (9th Cir. 1984) 20, 21
United States v. Mitchell,
812 F.2d 1250 (9th Cir. 1987) 20
United States v. Orozco-Santillan,
703 F.2d 1262 (9th Cir. 1990) 21
United States v. Salyer,
893 F.2d 113 (6th Cir. 1989) 33, 38
United States v. Skillman,
922 F.2d 1370 (9th Cir. 1991) 33, 38, 39, 40
United States v. Worthy,
915 F.2d 1514 (11th Cir. 1990) 33

Page

Williams v. Matthew Co.,
499 F.2d 819 (8th Cir. 1974) 35

Minnesota Decisions:
City of Little Falls v. Witucki,
295 N.W.2d 243 (Minn. 1980) 9
City of Minneapolis v. Lynch,
392 N.W.2d 700 (Minn. Ct. App. 1986) 9
City of St. Paul v. Mulnix,
304 Minn. 456, 232 N.W.2d 206 (Minn. 1975) 9
In re R.A.V.,
464 N.W.2d 507 (Minn. 1991) ..... *passim*
In re S.L.J.,
263 N.W.2d 412 (Minn. 1978) 9
State v. Hipp,
298 Minn. 81, 213 N.W.2d 610 (1973) 10
State v. Klimek,
398 N.W.2d 41 (Minn. Ct. App. 1986) 10
State v. Schweppe,
306 Minn. 395, 237 N.W.2d 609 (1975) 21

Foreign Decisions:
State v. Miller,
6 Kan.App.2d 432, 629 P.2d 748 (1981) 21
Village of Skokie v. National Socialist Party of
America, 69 Ill.2d 605, 373 N.E.2d 21 (1978) 24

United States Constitution:
U.S. Const. amend. I ..... *passim*
U.S. Const. amend. V 14
U.S. Const. amend. XIII 35

Federal Statutes: Page

18 U.S.C. § 112 (1990) 35
18 U.S.C. § 241 (1990) 33, 34
18 U.S.C. § 871 (1990) 20

Minnesota Statutes:

Minn. Stat. § 260.181, subd. 4 1
Minn. Stat. § 609.02, subd. 10 26
Minn. Stat. § 609.2231, subd. 4 ..... 4, 26
Minn. Stat. § 609.595 26
Minn. Stat. § 609.605, subd. 1 26
Minn. Stat. § 609.705 10
Minn. Stat. § 609.72 ..... 9, 26
Minn. Stat. § 609.713, subd. 1 26
Minn. Stat. § 609.746, subd. 2 26

Ordinance:

St. Paul, Minn. Leg. Code § 292.01 (1990) 4
St. Paul, Minn. Leg. Code § 292.02 (1990) ..... *passim*

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Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) 7, 37

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE[1]

On June 21, 1990, between the approximate hours of 1:00 and 3:00 a.m., Petitioner R.A.V.—then a juvenile[2]—was with

[1] Since there has been no trial on the charges, Respondent has attempted to state the facts, insofar as they pertain to Petitioner's involvement in the offense, based on police reports and statements that were attached to the petition alleging delinquency and in addition, that were discovered to the defense on July 4, 1990 as part of the prosecution's continuing duty of disclosure. On a motion to dismiss, facts in support of the prosecution's charges are assumed to be true. Moreover, one needs the factual context to analyze the various legal issues raised.

[2] Petitioner became 18 years old on March 13, 1991 and when he becomes 19, all juvenile court jurisdiction over him will end pursuant to Minn. Stat. § 260.181, subd. 4.

a group of other young white males who were good friends of each other and had been ingesting controlled substances and were attempting to find further supplies to consume.

At the first house where they stopped, no one was home, and the group collectively decided to go to Mounds Park. On the way they stopped by 291 Earl Street where two of the group spoke with those in the house through the window. Then the group entered the house.

291 Earl Street is the residence of Arthur Miller, II. Petitioner R.A.V. was then staying at Mr. Miller's house and doing some painting for him. At the time, Miller's son, co-defendant Arthur Miller, III,[3] and Petitioner were in the home alone. Miller and Petitioner had had some alcohol to drink and were the central instigators and enthusiastic supporters of the cross-burning that followed.

Petitioner went about the house to find the necessary materials and Petitioner and Miller set about the making of a cross. They used approximately two-feet long dowels from the legs of a broken chair they taped together to form a cross, which they then wrapped in terrycloth obtained from Petitioner's painting project. A propane tank was taped onto the horizontal member of the cross. Next to it was a shellac thinner can containing a small amount of flammable fluid.

Once it was completed, the six young men took the cross and a can of paint thinner across the street to 290 Earl Street in order to plant it in the lawn and light it. All six youths knew the residents of 290 Earl Street were African American.

The group of six went through the fence and onto the lawn

[3] Arthur Miller, III, who was eighteen years old on June 21, 1990, was charged with violation of St. Paul, Minn. Leg. Code § 292.02 and entered a plea of guilty to the offense.

of 290 Earl Street, and Petitioner, co-defendant Miller, and possibly one of the others, were involved in placing the cross, dousing it with paint thinner and lighting it. After the cross ignited, the group ran back to 291 Earl Street to hide. When the police came, the boys stayed inside as they began their production of a second and third cross. Again, Petitioner and Miller were the main instigators.

The complainant, an African American male who resides at 290 Earl Street, said he heard voices in his yard and when he went to look out the window, he saw a large flame burning in his yard. Though he saw no one, the complainant heard at least two voices. He was concerned because his was the only African American family living in the immediate neighborhood. He said he didn't know who could have done this.

Though the complainant and his five children, who ranged in age from six months to nine years, had experienced other acts of vandalism and name-calling over the preceding several months, there was no evidence these young men had been involved in any of them.

After the officers had left, a second cross was placed on the boulevard across the street from 290 Earl Street. Miller and Petitioner were involved in the placing and lighting of it.

When it was burning, the group made its way to a nearby apartment complex. There they lit a third cross in the parking lot on the northwest corner of Earl Street and Suburban Avenue. There are several African American families in this complex.

The group then ran back to 291 Earl Street where they remained briefly when Miller told them to leave before his father came home. Petitioner stayed on in the Miller home as he had before.

Petitioner admitted—indeed in one instance, bragged about —his involvement in the cross burning to two separate witnesses on the following day.

Pieces of a chair were found and seized at 291 Earl Street that matched the charred dowels formed into the cross found at the scene of the offense.

Four days after, on June 25, 1990, Respondent filed in the Juvenile District Court for Ramsey County, Minnesota a complaint charging Petitioner R.A.V., in two counts, with violation of Minn. Stat. § 609.2231, subd. 4 (bias-motivated assault in the fourth degree) and St. Paul, Minn. Leg. Code § 292.01 (bias-motivated assault).

On July 5, 1990, Count II was amended to charge bias-motivated disorderly conduct under St. Paul, Minn. Legis. Code § 292.02 which provides as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Juvenile District Court, Honorable Charles A. Flinn, Jr., on July 16, 1990 by order dismissed Count II, which order was by the State appealed to the Minnesota Court of Appeals. The Minnesota Supreme Court on August 3, 1990 granted direct accelerated review and by its opinion filed January 18, 1991 reversed the Juvenile Court, reinstated Count II of the petition and remanded the cause for trial on both counts. The opinion is reported at 464 N.W.2d 507 (Minn. 1991).

R.A.V. sought certiorari from that decision by petition filed on April 11, 1991, which petition was by order of this Court granted on June 10, 1991.

SUMMARY OF ARGUMENT

The St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02, as authoritatively construed and limited by the Minnesota Supreme Court, is neither substantially overbroad nor impermissibly vague in what it forbids. It can be defended against attack under the First Amendment to the United States Constitution as an enactment proscribing fighting words, true threats, and conduct directed to inciting or producing imminent lawless action.

Particularly in light of the carefully limited *scienter* provision that requires the prosecution to prove the acts of the accused were targeted against particular victims with a particular purpose, the Ordinance may not be applied to political expression in a traditional public forum. Therefore, the Ordinance does not have a chilling effect on such expression.

The Ordinance should not be subject to strict scrutiny, as it is content-neutral in the sense that its purpose is to protect victims from carefully defined harms, rather than to impact protected speech or forbid it based on its expressive content. In addition, strict scrutiny is inappropriate because the Ordinance does not forbid all bias-motivated conduct but only that employed with the requisite state of mind as defined.

Even if the Ordinance is assumed to be content-based, a compelling state interest exists to support it—protecting victims from violation of their basic human rights to self-esteem and security as members of groups historically subject to discrimination. The Ordinance is narrowly drawn to reach those goals.

Racial, religious, and gender-specific bias-motivated conduct deters the most important aspect of speech, the establishing of dialogue. On balance, the minimal First Amendment rights of one who clandestinely burns a cross in an African American's yard are far outweighed by the rights of the victims to live where they wish in peace.

ARGUMENT

I. SECTION 292.02 OF THE ST. PAUL, MINNESOTA LEGISLATIVE CODE, AS AUTHORITATIVELY CONSTRUED BY THE MINNESOTA SUPREME COURT, IS NEITHER SUBSTANTIALLY OVERBROAD NOR IMPERMISSIBLY VAGUE; IT IS VALID ON ITS FACE AND AS APPLIED TO PETITIONER'S CONDUCT.

(A) The St. Paul Ordinance has been authoritatively construed by the Supreme Court of Minnesota.

R.A.V., a juvenile, was charged in Count II of an amended petition of delinquency filed in the Juvenile Court for Ramsey County, Minnesota, with having violated St. Paul, Minn. Leg. Code § 292.02 (1990). This Ordinance provides that:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V.'s motion to dismiss that count was granted by the trial court and the prosecution appealed, being granted accelerated direct review in the Minnesota Supreme Court. That

court reversed, *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), and remanded for trial on both counts.

The Minnesota Supreme Court, at the outset of its unanimous decision, stressed the particular power historically found to inhere in certain symbols that target others based on their race, color, creed, religion or gender—the essential bedrock factors around which each of us organizes our essential identity within our community.

> Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1][*] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

In re R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

Noting that Petitioner did not claim the Ordinance was invalid as applied to his alleged conduct, the Minnesota Supreme Court then turned to the language of the Ordinance in light of prior authority construing similar provisions to determine whether it passed muster on its face against challenge under the First Amendment to the United States Constitution.

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[*]

[1] *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs—like all signs—that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

The St. Paul City Ordinance does not proscribe the use of racial, religious, or gender-specific symbols in all circumstances. As construed, the Ordinance applies only where the "symbol, object, appellation, characterization or graffiti", defined as a burning cross, Nazi swastika or other instrumentality of like import, is placed on public or private property with a particular *scienter* requirement.

To save the Ordinance from the challenge of substantial overbreadth, the Minnesota Supreme Court defined the Ordinance's element of *scienter*[4] in light of this Court's reasoning in *Texas v. Johnson*, 491 U.S. 397 (1989), forbidding prosecution of an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute.

> The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added).

In re R.A.V., 464 N.W.2d at 510.

Applying these principles to the St. Paul Ordinance, the Minnesota Court limited it to:

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[4] ". . . which ones knows or has reason to know arouses anger, alarm or resentment in others. . . ." St. Paul, Minn. Leg. Code § 292.02 (1990).

(a) "fighting words," " 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,' " *In re R.A.V.*, at 510. (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); and (b) conduct that is " 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action,' " *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

The existence of *scienter*, as defined by the Minnesota Supreme Court, that the State must prove, must be inferred from the words and acts of the accused. That is, the context in which the symbol is used. It is for the trier of fact to decide whether the State in a particular case has shouldered its burden of persuasion.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the case in which the Court first applied the fighting words doctrine to what was claimed to have been expressive speech, the Court accepted the authoritative limiting interpretation by the highest court of New Hampshire both as to the purpose and terms of the enactment which was challenged and as to its severability from other provisions. *Id.* at 572-73. *See also, Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws").

In the instant case, the interpretation of the St. Paul Ordinance was consistent with numerous prior decisions of the Supreme Court of Minnesota construing identical or very similar language in state or municipal enactments. *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978) and *State v. Klimek*, 398 N.W.2d 41 (Minn. Ct. App. 1986) (Minn. Stat. § 609.72, state statute on disorderly conduct); *City of Little Falls v. Witucki*, 295 N.W.2d 243 (Minn. 1980); *City of St. Paul v. Mulnix*, 304 Minn. 456, 232 N.W.2d 206 (1975), and *City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. Ct. App.

1986) (city disorderly conduct ordinances); *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973) (Minn. Stat. § 609.705 (3), state statute on unlawful assembly).

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court held that facial overbreadth may not be invoked when such a limiting construction has been authoritatively placed on a challenged statute in state court. *Id.* at 613.

In this Court's recent decisions, the rule continues to be stated that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989), (citations omitted) *reh'g denied*, 492 U.S. 937 (1989). *See also Massachusetts v. Oakes*, 491 U.S. 576 at 581-583 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988).

In Argument I of his brief, Petitioner claims the St. Paul Ordinance is substantially overbroad and vague based on its provisions *as written*, ignoring the Minnesota Supreme Court's limiting definition that this Court's decisions require be considered. His first argument is therefore irrelevant.

This Court has in fact certified issues of statutory construction to the appropriate state to permit its highest court to interpret a law's meaning where an authoritative construction would substantially aid review of a First Amendment question posed. *Virginia v. American Bookseller's Ass'n, Inc.*, 488 U.S. 905 (1988). This remedy has not been held to be appropriate where the clear import of the enactment's language precludes a narrowing construction that will save its constitutionality. *See City of Houston v. Hill*, 482 U.S. 451 (1987) (Court will not abstain to permit state court to decide issue or certify issue to state Court; "[t]his ordinance is not susceptible to a limiting construction because . . . its language

is plain and its meaning unambiguous." *Id.* at 468); *Erznoznik v. City of Jacksonville*, 422 U.S. 204, 216-217 (1975) (possibility of limiting instruction remote; state court previously made no attempt to limit its application).

At the outset of Argument II of his Brief, Petitioner misplaces his reliance on the latter line of authority. It applies only to situations, unlike that in the present case, where the state court has not, or will not, essay definitive limiting construction. Then and only then this Court has held it would not certify an issue, or abstain from deciding, when there is no reason to do so.

As opposed to the ordinance in the instant case, the failure of state courts properly to limit the definition of similar enactments to fighting words has led this Court to declare them invalid on their face or as applied to expressions that were merely disturbing, annoying, or offensive. *See e.g., Lucas v. Arkansas*, 416 U.S. 919, 920 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

(B) The St. Paul Ordinance forbidding racial, religious, and gender-biased disorderly conduct is not substantially overbroad.

Petitioner asks this Court to invalidate on its face the municipal ordinance under which he is charged—even though his conduct could be punished under the ordinance without violation of his constitutional rights. He makes this claim under the doctrine of substantial overbreadth; that the pendency of his prosecution will work a chilling effect on the exercise by others of their right to free expression.

The overbreadth rule has been judicially fashioned in derogation of

> the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others. *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985).
>
> * * *
>
> Overbreadth doctrine has wide-ranging effects, for a statute found to be substantially overbroad is subject to facial invalidation. We have therefore referred to overbreadth as "manifestl[y] strong medicine" that is employed "sparingly, and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (O'Connor, J., plurality opinion).

Application should be limited to situations where there exists a penal statute " 'susceptible of sweeping and improper application.' " *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)).

Broadrick v. Oklahoma, 413 U.S. 601 (1973), adds the caveat that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Id.* at 614-615. (citations omitted).

This is particularly significant in the instant case where conduct and not pure speech is proscribed.

> It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and

> when "such summary action" is inappropriate. *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971) (opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Cf. Alderman v. United States*, 394 U.S. 165, 174-175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick v. Oklahoma, 413 U.S. at 615.

Accord Boos v. Barry, 485 U.S. 312 (1988); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Substantial overbreadth is absent unless there is an objective basis for predicting that the right of expression of others,

will materially be chilled. *Land v. Taturn*, 408 U.S. 1, 13-14 (1972); *Bigelow v. Virginia*, 421 U.S. 809, 817-818 (1975). Clearly, no such basis exists in the instant case.

However the substantial overbreadth test is articulated it seems speculative at best, absurd at worst, to postulate that there will be significant amounts of expressive conduct chilled by the mere existence of this bias-related ordinance on the books and by Petititioner's pending prosecution for violation of it. Only where one uses a bias-motivated symbol with the requisite *scienter* is the Ordinance applicable. The prosecution must prove, to the satisfaction of the trier of fact, bias-motivated conduct in either of two contexts:

(a) where "directed to inciting or producing imminent lawless action and likely to incite or produce such action," or

(b) which, "by [its] very expression, inflict[s] injury or tend[s] to incite an immediate breach of the peace." *In re R.A.V.*, 464 N.W.2d at 510.

As so limited, the Ordinance is not colorably "susceptible of sweeping and improper application."

(C) The St. Paul Ordinance is not impermissibly vague in violation of the Fifth Amendment to the United States Constitution.

It is settled that "a statute, which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). On the other hand, as Justice Holmes observed, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only

may he incur a fine or a short imprisonment, . . . he may incur the penalty of death." *Nash v. United States*, 229 U.S. 373, 377 (1913).

As Justice Murphy concluded in *Chaplisky v. New Hampshire*, 315 U.S. 569 (1942):

> We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. *Cf. Cantwell v. Connecticut*, 310 U.S. 296 [(1940)]; *Thornhill v. Alabama*, 310 U.S. 88, 105 [(1940)]. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. *Cf. Fox v. Washington*, 236 U.S. 273, 277 [(1914)].

Id. at 573 (footnote omitted).

As in *Chaplinsky*, the ordinance in the instant case has been narrowed and clarified carefully to define what conduct is proscribed and what is not.

The critical limitation in the St. Paul Ordinance as defined lies in the *scienter* element. The prosecution must prove that the accused used a bias-related symbol to threaten, cause fear in, or intimidate a particular targeted person or persons. The context in which actions take place reasonably leads to a fair inference as to the intent with which they were taken.

Given this fact, it is fair to criminalize the placement of a bias-motivated symbol on public or private property so long as it is evident who the targeted victims are.

Petitioner claims that the Minnesota Supreme Court's definition, even as it may have eliminated some problems of overbreadth, has introduced "functional vagueness" in enforcement. This is not the case. The St. Paul Ordinance has no more danger of unequal enforcement than does any other enactment.

Moreover, the *scienter* provisions in many like enactments in Minnesota and elsewhere have been similarly construed, increasing the regularity and predictability of their application.

II. THE ST. PAUL ORDINANCE MAY BE SUSTAINED AGAINST FACIAL ATTACK UNDER THE *CHAPLINSKY* AND *BRANDENBURG* DECISIONS.

(A) The St. Paul Ordinance may validly be enforced as conduct that tends to invite an immediate breach of the peace.

The Minnesota Supreme Court in *R.A.V.*, 464 N.W.2d at 510, defined the St. Paul Ordinance in light of the fighting words doctrine citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1952); " 'those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace;' 315 U.S. at 572." The Minnesota Supreme Court's decision stated further that

> [a]lthough the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and therefore is not prohibited by the first amendment.

R.A.V., 464 N.W.2d at 511.

Justice Murphy's opinion for the Court in *Chaplinsky* states:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted).

In a number of cases since *Chaplinsky* was decided, this Court held that the enactments at issue went beyond the fighting words exception and either had not been limited or restrictively defined in state court decisions, or were not susceptible of such construction. *See, e.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972).

In dissenting opinions in all three of these cases, Justices Rehnquist and Blackmun stressed that the Court was "invalidating state statutes in wholesale lots because they 'conceivably might apply to others who might utter other words.' "

Lewis v. City of New Orleans, 415 U.S. at 137 (Blackmun, Rehnquist, JJ., dissenting), *quoting Gooding v. Wilson*, 405 U.S. at 535 (Blackmun, J., dissenting).

In *Gooding*, the Court seized on turn-of-the-century decisions in holding the statute was overbroad; in *Lewis*, the Court ignored the state court's decision, on remand in light of *Gooding*, that the statute was properly construed as limited to fighting words.

This Court's most recent "fighting words" case, *City of Houston v. Hill*, 482 U.S. 451 (1987), held the ordinance at issue substantialy overbroad. However, *the ruling did not impact the fighting words doctrine of Chaplinsky itself*, that fighting words are "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572.

Other more recent of this Court's cases have been held to implicate "marginal expression" that by its very nature is less entitled to protection under the First Amendment. This Court has never taken the position that freedom of expression holds absolute primacy over any competing interest. To admit that expression is involved is, therefore, not the end of inquiry, but merely its beginning.

Whereas it is "firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," *Street v. New York*, 394 U.S. 576, 592 (1969), this Court recognized in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988):

> that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." [*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 747 (1988)]. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), we held that a state could lawfully punish an individual for the use of insulting " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571-572. These limitations are but recognition of the observation in *Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance."

Hustler Magazine v. Falwell, 485 U.S. at 55-56 (1988).

See also, Grayned v. City of Rockford, 408 U.S. 104, 112-114 (1972) (proper to enforce noise ordinance in vicinity of school for willfully causing a "noise or disruption" incompatible with normal school activity).

"It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

Cross-burning is the expressive equivalent of a brutish grunt; in like manner only marginally within the outer perimeters of protected expression. One prohibited from cross-burning still has all other means of expression avaiable to express his views about African Americans or any other minority group. Limited protection is accorded expression of limited content.

(B) The St. Paul Ordinance may validly be enforced as conduct that by its very utterance causes injury.

A part of the rationale of the Minnesota Supreme Court's decision upholding the ordinance here at issue involved the State's undoubted authority to prohibit conduct or words "that

by their very utterance inflict injury." That is, threaten harm to others. *In re R.A.V.*, 464 N.W.2d at 510. The Minnesota Supreme Court relied on the fact that the use of a burning cross is "an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." *Id.* at 508.

It is settled that a statute forbidding threats of physical violence to another is constitutional on its face. Nevertheless, in its application, what is a genuine threat must be distinguished from what is constitutionally protected speech. *Watts v. United States*, 394 U.S. 705, 707 (1969) (statute makes threat to President of the United States criminal offense); *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987). The context is important in determining whether an apparent threat is indeed a true threat. *See United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990).

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. [*United States v.*] *Mitchell*, 812 F.2d [1250] at 1255-56 [(9th Cir. 1987)] (reasonable person standard employed in determining whether statement is threat under 18 U.S.C. § 871); [*United States v.*] *Merrill*, 746 F.2d 458, 462 [(9th Cir. 1984)]. Although a threat must be "distinguished from what is constitutionally protected speech" (*Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)), this is not a case involving statements with a political message. A "true" threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment. *Merrill*, 746 F.2d at 462.

United States v. Orozco-Santillan, 703 F.2d 1262, 1265-66 (9th Cir. 1990) (footnote omitted).

The objective test has generally been applied throughout the Federal Circuits. *Merrill*, 746 F.2d at 462.

Under Minnesota law, it is clear that the "true" threat need not be conveyed directly and in person to the intended victim. *State v. Schweppe*, 306 Minn. 395, 237 N.W.2d 609 (1975). "A threat," the court held, "is a declaration of an intention to injure another or his property by some illegal act." *Id.* at 399, 237 N.W.2d at 613. Evidence of purpose "requires either a direct threat to the victim or a threat made in such a way as to support the inference that the speaker intended it to be conveyed to the victim." *Id.* at 400, 237 N.W.2d at 614.

Based on its historical and cultural subtext, the burning of a cross under circumstances where it is aimed against one or a group of victims *is* such a threat. It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims. In this case, the fact finder certainly could—and necessarily would—so find. *See e.g., State v. Miller*, 6 Kan.App.2d 432, ——, 629 P.2d 748, 751 (1981).

So long as the question of who is intended to be victimized is clear, it should not make a difference whether the accused enters onto private property to burn the cross. The difference between a fenced yard and an open boulevard is germane only to ascertaining the intent of the actor.

(C) The St. Paul Ordinance may validly be enforced as conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action.

The Minnesota Supreme Court relied on this Court's holding in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) to formulate an alternative justification for the Ordinance—that it criminalizes solicitation and incitation of others to commit violent acts. Of critical importance is the nexus between the solicitation and the imminency of the violent response.

The holding in *Brandenburg* itself deals with Ohio's criminal syndicalism law, which purported to, and did, punish mere advocacy of violence and assembly with others for that purpose. There the act of cross-burning took place at a Ku Klux Klan rally, not in the yard of a Black family who had moved into an otherwise white neighborhood. The Court agreed Ohio could proscribe advocacy directed to inciting or producing imminent lawless action—the very limitation deemed implicit in the St. Paul Ordinance as construed by the Minnesota Supreme Court. It did not agree that advocacy of violence in the abstract was subject to proscription.

As Justice Holmes stated in his opinion in *Schenck v. United States*, 249 U.S. 47 (1919),

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52.

Cross-burning, by nature and history, is intimidating to anyone targeted. The only issue is thus whether the threat is clear and present.

To an African American family, the meaning of a burning cross in one's lawn is not remotely ambiguous.

Cross-burning, at least directly, carries no message other than to its targeted victim, who is both captive and vulnerable. The reasonable, even inevitable belief of the victim is that he is to be further targeted with physical injury or death unless he, as coerced, departs from the neighborhood.

III. BIAS-MOTIVATED OFFENSES DO NOT IMPLICATE POLICICAL DIALOGUE IN A PUBLIC FORUM.

The cases upon which Petitioner urges this Court to invalidate the Saint Paul Ordinance, principally the flag burning cases, are simply inapposite. In *Texas v. Johnson*, 491 U.S. 397 (1989) and *Eichman v. United States*, 496 U.S. ——, 110 S.Ct. 2404 (1990), American flags were burned in public as part of protest demonstrations. Each actor intended to express his dissatisfaction with the policies of his government and his action was not directed at any individual but intended to make a statement of opinion. There was no evidence that a breach of the peace was threatened, or even likely.

Flag burning or disrespect is profoundly and deeply offensive to most Americans but none would regard it as threatening or intimidating—nor in any way inimical to their living their lives as they have theretofore done.

So it was in *Cohen v. California*, 403 U.S. 15 (1971) when Cohen appeared in a courthouse corridor, a distinctly public place, wearing a jacket that bore on it the words "Fuck the Draft," words that could obviously offend others. His conviction was reversed, this Court holding that "fighting words" properly could be invoked only where the declarant sought to provoke a violent response, and that Cohen's words were

politically expressive even though partly emotive in content.

The Court applied the same distinctions in the Skokie, Illinois Nazi march cases. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. den.*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605, 373 N.E.2d 21 (1978). At issue in both of these decisions was the constitutionality of prohibiting or restricting a Nazi march. The proposed march was a *public* march and was not directed at any specific individual. While holding that the expressive content of the march could not be prohibited under the First Amendment, the Seventh Circuit proceeded to state: "There is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure." 578 F.2d at 1206. The Illinois Supreme Court held that the Nazis had a constitutional right to conduct the march, noting that the planned march had become common knowledge, that there was ample forewarning of its potentially offensive content, and that therefore a person could avoid a confrontation with the march. Once again, however, the Illinois Court reaffirmed that expressive conduct was not similarly protected when imposed on the privacy of one's home or on a captive audience. 69 Ill.2d at 609, 373 N.E.2d at 26.

The Jewish citizens of Skokie asserted outrage and abhorrence of the message of the Nazi marchers but did not express either a fear of violence by citizens from the marchers or by the marchers from them.

A similar distinction applies to *Boos v. Barry*, 485 U.S. 312 (1988), wherein this Court held that a federal statute prohibiting picketing within 500 feet of a foreign embassy was

unconstitutional as violative of the First Amendment. However, in so holding, the Court indicated its approval of another federal statute which prohibited willful acts or attempts to " 'intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties.' " *Id.* at 324-25 (citation omitted).

Petitioner has misconstrued the definition of "public forum" in this Court's decisions; any expression on public property is not made in a public forum, a concept that characterizes those places that have by tradition or rule been designated or understood to be places for an individual's or groups' free expression. *Members of the City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984).

Core political expression depends on context. Things like picketing (as in *Boos v. Barry, supra*), marching (as in *Collin v. Smith, supra*), and politically demonstrating (as in the flag burning cases) are commonly understood to lie at the heart of public expression, even though acts and not words are involved. Core political expression admittedly may not be proscribed for any but compelling reasons.

Secret cross burners and public flag burners are similar only in the unpopularity of the position that they take. The First Amendment does protect the unpopular. It does not, however, protect acts, the only expressive content of which is to threaten others.

History dictates that there is a need for *specific* enactments to deal with the use of symbols of racial, religious, ethnic or other group hatred. Otherwise, there is a danger that minority groups will not understand that this aspect of the behavior they have experienced is not condoned by the majority. This is a lesson the majority also must understand and openly acknowledge.

Therefore, Petitioner's often repeated argument that bias-related crimes may properly be prosecuted adequately under the general criminal laws is fatally flawed.[5] Only where the bias-motivated aspects of the conduct is explicitly addressed can dialogue start that will lead to reconciliation and peace among communities.

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[5] Petitioner, in his Brief, greatly overstates the applicability of Minnesota's general penal provisions as they relate to the alleged cross burning in this case. Minnesota's bias-motivated assault statute (Minn. Stat. § 609.2231, subd. 4) applies only to an act "done with *intent* to cause fear in another of *immediate* bodily harm or death" of the infliction of actual bodily harm (Minn. Stat. § 609.02, subd. 10) (emphasis added). The fear of harm experienced by the African American family in the instant case, while very real, may not be sufficiently immediate, nor may the requisite specific intent exist, to come within this definition. The terroristic threats provision (Minn. Stat. § 609.713, subd. 1) applies only when the *purpose* of a threat is to terrorize another. The trespass provision (Minn. Stat. § 609.605, subd. 1) applies only when a person refuses to leave private property or returns to the property after being told to leave. Similarly, the Minnesota interference with privacy provision (Minn. Stat. § 609.746, subd. 2) applies only if a person repeatedly follows or pursues another after being told not to do so. Minnesota's criminal damage to property provision (Minn. Stat. § 609.595) may have no application at all in the instant case, since Petitioner burned his own property, and no incidental burning of the victims' surrounding property is alleged. More fundamentally, whatever incidental damage to property may have occurred misses entirely the essence of the injury sustained and the crime committed. Finally, even Minnesota's disorderly conduct statute (Minn. Stat. § 609.72, subd. 1) applies to "offense, obscene or abusive language." Notwithstanding Petitioner's stance before this Court, Petitioner, if charged under the statute, undoubtedly would maintain that the *act* of burning a cross did not constitute language.

A late-night cross burning poses an anonymous, indefinite threat. The inability of the victim to identify the cross burner and to know when, where and how he will strike next, adds to the fear and terror of the victim. The specific harm caused by the burning cross is not directly addressed by any of the foregoing general penal provisions. Even if one or more of the other provisions applies, the mere overlap or duplication of penal provisions does not raise First Amendment issues.

The nature of the act depends on the context in which it is committed; Petitioner acted with a small group at night, his "expression" conveyed only—at least directly—to his victims, and indirectly to members of his victims' racial group.

The "context" was not one of expressing himself to others in the hope of eliciting their support. He did not act in a public forum; his acts or words—which are essentially equivalent—were not uttered as part of a peculiarly expressive event, as would be the case of (a) wearing clothing with a message on it, *Cohen v. California, supra*; (b) demonstrating politically (flag burning), *Texas v. Johnson, supra;* (c) picketing, *Boos v. Barry, supra*; or (d) parading, *Collin v. Smith, supra.* The cross burner does not shop in Justice Holmes' marketplace of ideas. He is not interested in his victim's responding, or in starting a dialogue. He wants his victim to be silent and intimidated, and simply to leave.

IV. THE ST. PAUL ORDINANCE IS A CONTENT-NEUTRAL ENACTMENT CAREFULLY TAILORED TO FURTHER THE COMPELLING STATE INTEREST OF PROTECTING THE FUNDAMENTAL RIGHTS OF VICTIMS OF BIAS-MOTIVATED HARASSMENT.

In *United States v. O'Brien*, 391 U.S. 367 (1968), a case involving draft card burning, Chief Justice Warren, for the Court, held that:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registra-

tion certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-377 (footnotes omitted).

Under the *O'Brien* test, the conduct of the accused which is criminalized must further a legitimate governmental purpose unrelated to the suppression of free expression. To decide this issue, the Court analyzes the enactment in terms of its purpose or justification, which is the controlling consideration. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989).

In the instant case, the Ordinance is intended not to impact on the right of free expression of the accused but rather to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against. The governmental purpose evaluation looks particularly to the

effects, primary and secondary, on the victims. In *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985), this Court evaluated the purpose of a city ordinance prohibiting adult movie theaters from locating within a certain distance of residential zones, churches, parks, or schools. This Court held:

> In short, the . . . ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence, supra,* [468 U.S.] at 293; *International Society for Krishna Consciousness, supra,* [452 U.S.] at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra,* [408 U.S.] at 95-96.

City of Renton v. Playtime Theaters, Inc., 475 U.S. at 48-49 (1986).

The operative condition for the Ordinance to be applied in the instant case is the actual or attempted coercion of the targeted victims, worked through threatening and intimidating acts. The constitutionality of enforcement of the Ordinance is manifest even if there is an incidental effect on conduct the accused claims is the equivalent of protected expression. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In this Court's recent decision in *Barnes v. Glen Theater, Inc.*, —— U.S. ——, 59 LW 4745 (1991), the plurality opinion identifies preventing public nudity, and not nude expressive dancing, as the governmental interest advanced. Of relevance to the instant case, the opinion points out that enforcement of the anti-nudity ordinance leaves abundant opportunity for self-expression through nearly nude dancing. In a like manner, the St. Paul Ordinance leaves to Petitioner ample avenues for venting any opinions he might wish without fear of transgression of bias-motivated crime legislation. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

The *Barnes* opinion stresses that any First Amendment interests implicated in a ban on nude dancing are minimal at best. While holding that " 'nude dancing is not without its First Amendment protections from official regulation' " *citing Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), the plurality opinion goes on to state that "nude dancing of the kind sought to be performed here is *expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.* This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the . . . statute is an impermissible infringement of that protected activity." *Barnes v. Glen Theater, Inc.*, —— U.S. ——, ——, 59 LW 4745, 4747 (1991) (emphasis added). The instant case is, as we have seen, similar in that respect as well.

Under the *O'Brien* test, the enactment must also be narrowly drawn to further the governmental interest without unduly impinging on protected expression. *Sable Communications of California, Inc. v. F.C.F.*, 492 U.S. 115, 125-126 (1989); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Wayte v. United States*, 470 U.S. 598, 613 (1985). *Compare Shad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (banning all live entertainment in borough not sufficiently narrowly tailored).

The enactment need not be the least intrusive alternative possible; it suffices if it is

> narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *see also Community for Creative Non-Violence, supra*, 468 U.S. at 297. To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *See Frisby v. Schultz*, 487 U.S. at ——, 108 S.Ct. at 2502 ("[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil"). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989) (footnotes omitted).

When the accused claims that his conduct is expressive, his First Amendment interests, to the extent they exist, must be balanced against competing societal interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 at 805-808 (1984); *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

The minimal expressive conduct of the accused here stands in stark contrast to the important and vital personal rights of victims that are vitiated by violation of the Ordinance. *See New York v. Ferber*, 458 U.S. 747 (1982) (criminal statute forbidding child pornography, even if it is not obscene, does not violate First Amendment; harm to children clearly outweighs defendant's right to express himself freely). Victims are targeted not, essentially, because of their individual attributes but simply because they are members of a particular race, religion, or gender that has historically suffered discriminatory treatment. Moreover, experts understand that by attacking a person's community, one interferes with that person's concept of self and individual growth and development.

In the instant case, the victims' right to live in peace where they wish, and where they have a constitutional right to reside, is seriously compromised. The message of the cross burner is that the targeted victim should move out of the neighborhood; the only—and brutal—message conveyed.

Frisby v. Schultz, 487 U.S. 474 (1988) recognizes that individuals who are targeted *in their homes* by one claiming a First Amendment right to approach them with an expressive message have special rights as a "captive audience." As in *Frisby*, the environs of the targeted residence are, in the instant case, clearly not a public forum. Those within the

home are a "captive audience" who can do nothing on their own—save leaving the neighborhood—to protect themselves from being an "unwilling" observer of the cross burning outside. If they come outside, they will likely be subjected to worse intimidation and harassment.

This Court has held that mere disturbance or annoyance—far less than the demonstrated harm in the instant case—justifies protecting the captive audience in its home.

As this Court concluded in *Frisby*, "[w]e have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.' [*Kovacs v. Cooper*, 336 U.S. 77, 86 (1949)]. There simply is no right to force speech into the home of an unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulation of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1969).

In a number of cases, cross burning has been the gravamen of offenses alleged under Title 18, section 241 (1990) of the United States Code which provides, in part, that it is a crime to "conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . ." Specifically, the act of the accused in these cases is claimed to have interfered with the federally guaranteed right to occupy a particular dwelling. *See, e.g., United States v. Lee*, 935 F.2d 952 (8th Cir. 1991); *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991); *United States v. Worthy*, 915 F.2d 1514 (11th Cir. 1990); *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989).

In *Lee*, the defendant's claim that application of the law to his conduct violated his First Amendment rights was rejected by the Eighth Circuit Court of Appeals.

> We proceed on a predicate that cross burning is conduct which possesses sufficient elements of communication to implicate the first amendment. However, it does not necessarily follow that the burning of this cross was protected first amendment activity. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The relevant inquiry is whether the governmental interest in regulation is related to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). If the interest is related to the suppression of expression, we must apply a heightened standard of review. *Id.* If the interest is unrelated to the suppression of expression, the more deferential *O'Brien* standard will apply. *Id.*
>
> We hold that the governmental interest supporting this regulation is unrelated to the suppression of free expression. Section 241 does not prohibit conspiracies to communicate offensive or racist messages; it does not prohibit conspiracies to simply burn a cross. Section 241 is a content neutral statute which prohibits conspiracies to threaten or intimidate others in the exercise or enjoyment of their federally guaranteed rights. As applied to the facts before us, section 241 does not prohibit Lee from conspiring to burn a cross to convey an offensive message or a message of racial hatred. *Rather, the statute prohibits Lee from conspiring to burn a cross to threaten or intimidate targeted individuals in the exercise of their federally guaranteed right to rent and occupy a dwelling* [emphasis added]. *See CISPES (Committee in Solidarity with the People of El Salvador) v. Federal Bureau of Investigation*, 770 F.2d 468, 474 (5th Cir. 1985).[3][*]

* * *

> Section 241 is intended to protect the free exercise of all rights and privileges secured by the Constitution and by all laws of the United States. *United States v. Price*, 383 U.S. 787 (1966). To the extent that the enactment of section 241 is an exercise of the power of Congress to enforce the thirteenth amendment by and through legislation, we hold that it is valid. *See* U. S. Const. amend. XIII, § 2; *cf. Williams v. Matthew Co.*, 499 F.2d 819, 825 (8th Cir. 1974) (Fair Housing Act of 1968 is also an exercise of Congress' power under the thirteenth amendment).

United States v. Lee, 935 F.2d at 954-955.

The *Lee* court, in holding "the incidental restriction on first amendment freedom is no greater than that which is essential to further the governmental interest," relied on section 241 being

> a narrowly tailored law which targets and eliminates the exact source of "evil" it seeks to remedy by requiring a strict scienter requirement. *Cf. Boos v. Barry*, 485 U.S. 312, 326 (1988) (18 U.S.C. § 112 "does not prohibit picketing; it only prohibits activity undertaken to 'intimidate, coerce, threaten or harass.' "

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[3] In *CISPES*, the Fifth Circuit reviewed 18 U.S.C. § 112(b)(1)-(2), which makes it a crime to "intimidate, coerce, threaten or harass" a foreign official in the performance of his duties. The court concluded that § 112(b)(1)-(2) does not restrict any particular message, but rather proscribes conduct of a threatening or intimidating nature. *See also, Boos v. Barry*, 485 U.S. 312, 326 (1988) ("[Section] 112 is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects.").

* * *

Although persons must generally tolerate highly offensive and disturbing speech, the government may restrict such speech where it intrudes on the privacy of the home or where the degree of captivity makes it impractical for an unwilling listener or viewer to avoid exposure to the speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975).

* * *

The jury could readily have found that Lee's conduct was tantamount to intimidation by threat of physical violence. It was not mere advocacy, but rather an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people.[5] Upon the record evidence, the jury could have found that the cross burning was an especially intrusive act which invaded the substantial privacy interests of its victims in an essentially intolerable manner. To protect the inhabitants of this nation from such an attack on civil rights does not violate the spirit of the first amendment.

United States v. Lee, 935 F.2d at 954-956.

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[5] Lonetta Miller, a seventy-one year old black woman testified on cross-examination as follows:

Q: Could you tell the ladies and gentlemen of the jury what a cross burning means, whether it is in the south or anywhere else?

A: Well it is a form of intimidation; the ku klux klan uses it for threats; promises of violence, and that sort of thing.

From what I understand a lot of the cross burnings in the south during the civil rights movement preceded hangings and that sort of thing. Of course, being a black, that is what it calls to mind.

Tr. at 354.

This court's holding in *Brown v. Board of Education*, 347 U.S. 483 (1954) establishes once and for all that the right to equality owed all citizens goes beyond mere physical equality. The holding postulates that separation of black from white "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." That is, separate is inherently unequal. *Id.* at 494.

Burning of crosses, or the use of symbols of like racial, religious, or gender-related meaning, is intended to further the goal of isolating or stigmatizing persons because of the group of which they are a part. Such symbols serve their purposes not in creating, but in suppressing dialogue that could lead to reconciliation among communities.

To one who is a member of the majority, it is extremely difficult to understand the "outsider jurisprudence" that derives from considering and fully appreciating "the victim's story of the effect of racist hate messages." *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2321 (1989). *See also* Delgado, *Words that Wound, A Tort Action for Racial Insults*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303 (1986).

> [T]he characteristic most significant in determining the value of racial insults is that they are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm.
>
> Racial insults may usefully be analogized to obscenity. Although the government may regulate obscenity, it may

> not prohibit expression of the view that obscenity should be protected or that, for example, adultery may be proper behavior. Similarly, protecting members of racial minorities from injury through racial insults, and society itself from the accumulated harms of racism, is very different from prohibiting espousal of the view that race discrimination is proper.

Delgado, *Words that Wound*, 17 Harv. C.R.-C.L. L. Rev. at 177 (footnotes omitted).

In *Salyer*, and *Skillman*, *supra*, enhanced sentences were imposed and held justified based on the fact that cross burning is directed at African American victims who are particularly susceptible or vulnerable to that criminal conduct. In *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989),

> [t]he district court reasoned, a black person is more likely than other minorities to be the victim of a cross burning, because the act has a special capacity to evoke terror among black Americans. As the district court stated:
>
> > There is a history of violence and intimidation which is directed against blacks and which is symbolized by a burning cross. That's exactly the symbol that these defendants chose to invoke and they chose to do so because that is precisely the way in which the family was most vulnerable to the threat of intimidation.

Salyer, 893 F.2d at 116 (citation omitted).

In *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991),

> There was ample testimony to substantiate the court's finding that a black family in a predominantly [white] neighborhood is particularly susceptible to a burning

cross in the night in their front yard and that the defendant knew or should have known of this particular susceptibility.

There was particularly poignant evidence in the trial testimony and the presentence report that the Heisser family was "particularly susceptible to the criminal conduct." The trial testimony and presentence report revealed the following reaction to the burning cross. At about 4:30 a.m., the Heisser daughter was awakened by noise and an orange glow from outside her bedroom window. Peering outside the window, she saw a flaming cross on the family front lawn. She woke up her brother and told him to wake up the parents. After the mother saw the burning cross, she was crying on her knees in the living room. Upon seeing the cross, the mother felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "Nothing good. Murder, hanging, rape, lynching. Just anything bad that you can name. It's the worst thing that could happen to a person." The presentence report also noted that "the victim's family is extremely traumatized" by the cross burning incident. Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. Mr. Heisser "stated that he felt at the time that his 'home and women' had been violated and he was powerless to take action against the unknown perpetrator." Seven months after the incident, the family still lived in fear. Mr. Heisser still awakened at night to investigate any noises. Mrs. Heisser was prescribed medication to deal with the incident and could not afford a

psychologist which her doctor recommended. She was often reduced to tears in discussing the incident and is afraid when she stays home alone.

This is a reaction reasonably to be anticipated from this criminal conduct. Skillman knew or should have known that a black family, such as the Heisser family, would be terrified and particularly susceptible to this criminal conduct.

Skillman, 922 F.2d at 1378.

The facts in *United States v. Lee*, *supra*, where the validity of the conviction, not the sentence, was at issue, also highlight the story from the victim's standpoint.

The drinking and discussion continued throughout the day. At approximately three o'clock, Werner Jahr mentioned that he had read an article about the Ku Klux Klan. He told Lee that if the Klan were there, there would be a cross burning. Jahr suggested they burn a cross and Lee agreed that it was a good idea. Lee then constructed a wooden cross. Later that afternoon, Lee told Dockter's sister that he intended to burn the cross because there were problems with the people upstairs and he was going to do something about it.

At approximately ten o'clock, Lee changed into dark clothes. There was testimony that Lee also donned a white mask. Lee then burned the cross on a small hill about 386 feet from the apartment buildings. Although the cross had been soaked with mineral spirits, it burned only briefly. Witnesses testified that Lee seemed disappointed that the cross had not burned longer.

The burning cross was seen by Pearl Jones and her family and friends from the Joneses' balcony. Pearl Jones testified that she was afraid when she saw it

because it made her think of the Ku Klux Klan—"peoples that hate blacks." Tr. at 189. Upon seeing the cross, she said "I hope they don't come up here and burn us up." Tr. at 191. She felt the cross burning was directed at her.

Lee later stated to another tenant that he had taken part in the cross burning and he knew cross burning was a symbol of the Klan. He also said he had burned the cross to take a stand and that "[m]aybe that would get rid of some of the bad blacks that were there, they would take the message seriously and leave."

Tr. at 288.

United States v. Lee, 935 F.2d at 954.

From reading Petitioner's Brief and the Briefs *Amici Curiae* filed on his behalf, one would think that violation of the St. Paul Ordinance is a victimless crime. That is not the case.

There are rights to liberty at least as basic on the side of the victim as on the side of the perpetrator of this offense. Where rights are in conflict, they must be balanced. It is Respondent's position that the minimal interest in free expression on the part of the Petitioner is far outweighed by the freedom of the victim to live where he wishes and by the right to equal treatment in the society of which he is a member.

In summation, even were the St. Paul Ordinance found to be content-biased, the vital interests of the victim constitute that compelling state interest which justifies limiting the perpetrator's conduct.

CONCLUSION

For the reasons stated, Respondent prays the Court affirm the decision of the Minnesota Supreme Court and remand the matter for prompt hearing on the merits.

Respectfully submitted,

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Dated: August 23, 1991

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